No. 85-1708

Supreme Court, U.S.
FILED
AUG 8 1986
JOSEPH F. SPANIOL, JR.
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1985

STATE OF CALIFORNIA, *et al.*,
Appellants,
v.
CABAZON BAND OF MISSION INDIANS, *et al.*,
Appellees

On Appeal from the United States
Court of Appeals for the Ninth Circuit

BRIEF OF THE STATES OF ARIZONA, NEVADA AND NEW MEXICO

AS AMICI CURIAE IN SUPPORT OF THE STATE OF CALIFORNIA

ROBERT K. CORBIN
Attorney General of Arizona

ANTHONY B. CHING
Solicitor General
Office of the Arizona
Attorney General

IAN A. MACPHERSON*
Chief Counsel, Tax Division
Office of the Arizona
Attorney General
1275 W. Washington St.
Phoenix, Arizona 85007
(602) 255-1719

*Counsel of Record

[Names and addresses of additional counsel on inside cover]

STATE OF NEVADA
BRIAN MCKAY
Attorney General of Nevada
Heroes Memorial Building
Carson City, Nevada 89710
(702) 885-4170

STATE OF NEW MEXICO
PAUL BARDACKE
Attorney General of New Mexico
P.O. Drawer 1508
Bataan Memorial Building
Santa Fe, New Mexico 87504-1508
(505) 827-6000

TABLE OF CONTENTS

	Page
INTEREST OF THE AMICI CURIAE	1
SUMMARY OF ARGUMENT	3
ARGUMENT	4
I. The Rationale of *Rice v. Rehner* Should Control	4
II. Notions of Tribal Self-Government Are Not Dispositive of the Gambling Issues Herein	7
III. The "Civil/Regulatory - Criminal/Prohibitory" Dichotomy Must Yield to the Legislative History of the Assimilative Crimes Act and Pub.L. 83-280	9
IV. Any Ruling on the Merits in this Case Should be Narrowly Drawn	28
CONCLUSION	29
APPENDIX	APX.

TABLE OF CASES AND AUTHORITIES

	Page
Barona Group of the Capitan Grande Band of Mission Indians v. Duffy, 694 F.2d 1185 (9th Cir. 1982), *cert. denied* 461 U.S. 929 (1983)	10,11,12,22,28
Bryan v. Itasca County, 426 U.S. 373 (1976)	3,6,7,21,22,23,25,27,28
Cabazon Band of Mission Indians v. County of Riverside, 783 F.2d 900 (9th Cir. 1986)	4,8,11,12,22,28
DeCoteau v. District County Court, 420 U.S. 425 (1975)	5
Fisher v. District Court, 424 U.S. 382 (1976)	7
Heath v. Alabama _____ *U.S.* _____, *106 S. Ct. 433 (1986)*	29
Hendrick v. Maryland, 235 U.S. 610 (1915)	19
Hicks v. Miranda, 422 U.S. 332 (1975)	6
Kerr McGee Corp. v. Navajo Tribe of Indians, _____ U.S. _____, 105 S.Ct. 1900 (1985)	8
Johnson v. Yellow Cab Transit Co., 321 U.S. 383 (1944)	15,16,22
Mandel v. Bradley, 432 U.S. 173 (1977)	6
New York, ex rel. Ray v. Martin, 326 U.S. 496 (1946)	21
Omaha Tribe of Indians v. Peters, 382 F.Supp. 421 (D. Minn. 1974), *affirmed* 516 F.2d 133 (8th Cir. 1975), *vacated* 427 U.S. 902 (1976)	22
Penobscot Nation v. Stilphen, 461 A.2d 478 (Me.Sup.Jud.Ct. 1983), *appeal dismissed* 464 U.S. 923 (1983)	6,10
Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico, _____ U.S. _____, (July 1, 1986, 46 CCH S.Ct. Bull. P. B4135)	29,30

TABLE OF CASES AND AUTHORITIES (cont)

	Page
Railway Express Agency, Inc. v. New York, 336 U.S. 106 (1949)	19
Raymond Motor Transport, Inc., v. Rice, 434 U.S. 429 (1978)	19
Rice v. Rehner, 463 U.S. 713 (1983)	3,4,5,6,7,8,12,14,29
Seminole Tribe of Florida v. Butterworth, 491 F. Supp. 1015 (S.D. Fla. 1980), *affirmed* 658 F.2d 310 (5th Cir. 1981), *cert. denied* 455 U.S. 1020 (1982)	10,11,12,13,22,28
State of Arizona v. Herber, 123 Ariz. 214, 598 P.2d 1033 (App. 1979)	21
Surplus Trading Co. v. Cook, 281 U.S. 647 (1930)	9
United States v. Antelope, 430 U.S. 641 (1977)	21
United States v. Dakota, _____ F.2d _____ (No. 85-1568, 6th Cir. July 18, 1986)	10
United States v. Marcyes, 557 F.2d 1361 (9th Cir. 1977)	13,14,15,16,22
Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134 (1980)	5,8
Williams v. Lee, 358 U.S. 217 (1959)	3,5,7,8
Williams v. United States, 327 U.S. 711 (1946)	14

FEDERAL STATUTES AND REGULATIONS

Act of March 4, 1909, c.321, 35 Stat. 1145	17
Act of June 15, 1933, c.85, 48 Stat. 152	18
Act of Aug. 15, 1953, c. 505, 67 Stat. 558-590 (Pub.L. 83-280)	*Passim*
15 U.S.C. § 1171	12
15 U.S.C. § 1175	12

TABLE OF CASES AND AUTHORITIES (cont)

	Page
18 U.S.C. § 13	3,11,12,14,16,20,21,26,28
18 U.S.C. § 468	14,15,17
18 U.S.C. § 1161	4
18 U.S.C. § 1162	2,3,11
18 U.S.C. § 1162(c)	21
28 U.S.C. § 1360	2,3,25
25 C.F.R. § 140.18	6
25 C.F.R. § 140.21	12

LEGISLATIVE MATERIALS

S.Rep. No. 699, 83rd Cong., 1st Sess. (1953)	23,24,25,26
H.R. 1063, 83rd Cong., 1st Sess. (1953)	21,23,26
H.R. 5091, 73rd Cong., 1st Sess. (1933)	18,20
H.R. 7018, 76th Cong., 3rd Sess. (1940)	14
H.R. 10589, 72nd Cong., 1st Sess. (1932)	17,18
H.R. Rep. No. 56, 73rd Cong., 1st Sess. (1933)	18
H.R. Rep. No. 848, 83rd Cong., 1st Sess. (1953)	23,24,26
H.R. Rep. No. 959, 72nd Cong., 1st Sess. (1932)	17,18
H.R. Rep. No. 1584, 76th Cong., 3rd Sess. (1940)	14
77 Cong. Rec. S5530 (daily ed. June 10, 1933)	18,19
86 Cong. Rec. H1626 (daily ed. Feb. 19, 1940)	14
U.S. Code Cong. & Admin. News 1953, p.2409	23
U.S. Code Cong. & Admin. News 1953, p.2412	24

TABLE OF CASES AND AUTHORITIES (cont)

Page

STATE STATUTES

Ariz. Rev. Stats. Ann. § 13-3302 2

Ariz. Rev. Stats. Ann. § 13-3307.A..... 2

Fla. Stat. § 849.093..... 13

OTHER AUTHORITIES AND MATERIALS

F. Cohen, *Handbook of Federal Indian Law* (1982 ed.) 14,21

Goldberg, PUBLIC LAW 280: THE LIMITS OF STATE JURISDICTION OVER RESERVATION INDIANS, 22 U.C.L.A.L.Rev. 535 (1975) 21,23,24,25,26

Letter from Assistant Secretary of Interior Orme Lewis to Congressman A.L. Miller, Chairman, Committee on Interior and Insular Affairs, House of Representatives, relating to H.R. 1063 (Pub.L. 83-280), June 26, 1953 26,27

Note: THE FEDERAL ASSIMILATIVE CRIMES ACT, 70 Harv.L.Rev. 685 (1957) 17

Report to the President and the Attorney General of the President's Commission on Organized Crime, *The Impact: Organized Crime Today* (1986) 22

No. 85-1708

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1985

STATE OF CALIFORNIA, *et al.*,
Appellants,
v.
CABAZON BAND OF MISSION INDIANS, *et al.*,
Appellees

On Appeal from the United States
Court of Appeals for the Ninth Circuit

BRIEF OF THE STATES OF ARIZONA, NEVADA AND NEW MEXICO AS AMICI CURIAE IN SUPPORT OF THE STATE OF CALIFORNIA

INTEREST OF THE AMICI CURIAE

The interest of the Amici Curiae States in support of the State of California lies in their desire to have clarified the confused and unsettled state of the law with regard to gambling activities in areas of Indian country situated within the States. Specifically, it is the concern of the Amici Curiae States, consisting of jurisdictions wherein Pub.L. 83-280 (hereinafter "Pub.L. 280") is not generally applicable, that the question presented in this case be resolved in a manner upholding the jurisdiction of all States, whether or not possessed of jurisdiction under Pub.L. 83-280 to enforce

their laws against unauthorized gambling throughout the States. [1]

Each of the Amici Curiae States has one or more areas of Indian country included within its boundaries wherein various forms of gambling activities are either presently being conducted or eventually could be conducted. These activities include bingo, parimutuel jai alai, parimutuel horse and/or dog racing, lotteries, keno, video gaming machines, and full-scale casino operations. All of these activities, as conducted, either are or would be in derogation of one or another of the Amici Curiae States' laws. [2]

---

[1] Pub.L. 280 is codified at 18 U.S.C. § 1162 and 28 U.S.C. § 1360 and grants to several states, including California, certain civil and criminal jurisdiction over Indians within areas of Indian country located in the named States. Although Pub.L. 280 is not of general application in the Amici Curiae States, the rationale of the decision in the present case raises various questions with regard to Indian country gambling activities in both Pub.L. 280 States and non-Pub.L. 280 States.

[2] For example, it is the position of the Amici Curiae State of Arizona that a parimutuel jai alai fronton proposed near Phoenix would violate Ariz. Rev. Stats. Ann. § 13-3307.A:

> "Subject to the exceptions contained in [Ariz. Rev. Stats. Ann.] § 5-112 [parimutuel horse, horse harness and dog racing], no person may engage for gain, hire, reward or profit in the business of accepting, recording or registering any bet, purported bet, wager or purported wager or engage for gain, hire, reward or profit in the business of selling wagering pools or purported wagering pools with respect to the result or purported result of any sporting event, contest or other game of skill or chance or any other unknown or contingent future event or occurrence whatsoever."

With regard to video gambling devices being used at Indian country bingo operations near Phoenix and Tucson, the Amici Curiae State of Arizona's position is that they are in violation of Ariz. Rev. Stats. Ann. § 13-3302:

> "A person who knowingly deals, carries on, opens or causes to be opened, or who conducts, either as owner, proprietor or employee, whether for hire or not, any slot machine, punchboard or machine of like character, whether played for money, checks, credits or other representative of value is guilty of a class 2 misdemeanor."

The grave potential for the erosion of the legitimate law enforcement objectives and powers of both Pub.L.280 States, such as California, and non-Pub.L. 280 States, such as the Amici Curiae, with regard to gambling operations in Indian country within their borders, coupled with the dangers that gambling which is unregulated by the States poses to the health, safety and welfare of their residents, motivates the Amici Curiae States to urge reversal of the decision of the United States Court of Appeals for the Ninth Circuit herein.

SUMMARY OF ARGUMENT

The reasoning and rationale of this Court's decision in *Rice v. Rehner*, 463 U.S. 713 (1983) should be applied to the factual and legal issues in the present case. Notions of tribal sovereignty and self-government which have evolved in other areas of Indian law should not be applied in the present case in a manner which results in the wholesale disregard for the legitimate law enforcement objectives and concerns of the States. The right of an Indian tribe to make its own laws "and be ruled by them," *Williams v. Lee*, 358 U.S. 217, 220 (1959), cannot properly be transformed into a mechanism by which Indian country gambling activities, catering almost exclusively to non-Indian, non-tribal member residents of the States, are permitted to operate in such a fashion as to allow non-Indian State residents to gamble in ways that are in violation of otherwise applicable State laws.

The legislative history of Pub.L. 280 (18 U.S.C. § 1162 and 25 U.S.C. § 1360) and the "Assimilative Crimes Act" (18 U.S.C. § 13) strongly supports the conclusion that the reasoning of this Court's decision in *Bryan v. Itasca County*, 426 U.S. 373 (1976) is not properly applied to the "civil/regulatory - criminal/prohibitory" dichotomy which informs the Indian country gambling analysis of the lower court opinion herein. The legislative history of the cited federal laws is replete with indicia that Congress intended to include within the scope of both Pub.L. 280 and 18 U.S.C. § 13 the penal enforcement provisions of State laws otherwise characterized as "civil/regulatory".

Finally, it is the position of the Amici Curiae States that, in any event, even if the lower court opinion be affirmed, this Court's decision should be confined to the gambling activities under consideration in the State of California and not be extended by implication to other gambling operations conducted or proposed to be conducted elsewhere, particularly in States, such as the Amici Curiae States, where Pub.L. 280 does not generally apply.

ARGUMENT

I

The Rationale of Rice v. Rehner Should Control

It is the position of the Amici Curiae States that the reasoning of the decision in *Cabazon Band of Mission Indians v. County of Riverside*, 783 F.2d 900 (9th Cir. 1986) is fundamentally flawed and must be rejected. This Court's decision in *Rice v. Rehner*, 463 U.S. 713 (1983) compels the conclusion that the lower court ruling herein must be reversed.

To begin with, this Court held in *Rice*, *supra*, that the State of California could properly require a federally-licensed Indian trader to obtain a State liquor license prior to selling liquor for off-premises consumption. In so concluding, this Court inquired into whether there existed a tradition of tribal sovereign immunity from such state action, noting that if no such tradition exists or if it can be found that the balance of State, Federal and Tribal interests so requires, traditional preemption analysis would "accord less weight to the 'backdrop' of tribal sovereignty." *Rice*, *supra*, 463 U.S. at 720.

Although the analysis in *Rice*, *supra*, focused primarily upon the provisions of 18 U.S.C. § 1161 regarding the regulation of liquor in Indian country, the rationale of the decision has clear application herein. This conclusion is compelled because Indian tribes enjoy no historical tradition of conducting high-stakes commercialized gambling operations which cater to a transient, non-Indian/non-tribal

member clientele and which exist *only* because such gambling operations offer that which is prohibited beyond Indian country. [3]

Although this Court recognized that the principles of tribal "self-government" articulated in *Williams v. Lee*, 358 U.S. 217 (1959) generally operate to insulate reservation Indians from State laws, it also observed that, although in Indian matters Congress usually acts upon the assumption that the States have no power to regulate the affairs of Indians in Indian country, "that assumption would be unwarranted in the narrow context of the regulation of liquor." *Rice, supra*, 463 U.S. at 723. The same conclusion should obtain with regard to Indian country gambling operations. In this regard, this Court then held that since there is no tradition of sovereignty immunity favoring the Indians with regard to liquor regulation and since the activity there in question "potentially has a substantial impact beyond the reservation, we may accord little if any weight to any asserted interest in tribal sovereignty in this case." *Rice, supra*, 463 U.S. at 725.

In examining the canons of construction which hold that, in general, state laws are inapplicable to reservation Indians unless Congress expressly so states and that ambiguities should be resolved in favor of the Indians, this Court quoted from its prior decision in *DeCoteau v. District County Court*, 420 U.S. 425, 447 (1975), stating that "[a] canon of

---

[3] The Ninth Circuit opinion recharacterized the "tradition" issue as being whether a tribe "is engaged in a traditional governmental function, not whether it historically engaged in a particular activity." *See Cabazon, supra*, 783 F.2d at 906. The court then found that since the tribes were engaged in the "traditional governmental function of raising revenue," they were exercising their "inherent sovereign governmental authority." Id. The mere revenue-generating potentials of a particular activity cannot properly, under the claim of tribal "sovereign governmental authority", legitimize violations of otherwise applicable State laws, particularly where substantial numbers of non-Indians and non-tribal members are involved. *See, e.g., Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 151 (1980).

construction is not a license to disregard clear expressions of congressional intent." *Rice*, *supra*, 463 U.S. at 733.

As will be amply demonstrated hereafter, Congress appears clearly to have expressed its intention that, through the enactment of Pub.L. 280, States subject to said law were empowered to exercise not only purely "criminal/prohibitory" state laws within Indian country, but also the penal sanction components of State laws otherwise characterized as "civil/regulatory" in their general nature. To the extent that the decision in *Bryan*, *supra*, concludes that Pub.L. 280 does not grant civil substantive authority to impose state taxes upon reservation Indians within Indian country, it is plainly distinguishable.

In this regard, a State law requiring that taxes be paid implicates entirely different concerns than does a State law prohibiting or punishing specified gambling activities. The unique historical facts and the decisions of this Court relating to the immunities of tribal member Indians from taxation by the States have no parallel or counterpart vis-a-vis Indian country gambling activities. In point of fact, the notion that the rationale supporting tribal immunities from State taxes is properly extrapolated to similarly insulate Indian gambling operations has already been rejected, with an appeal to this Court on the point having been dismissed for want of a substantial federal question. *Penobscot Nation v. Stilphen*, 461 A.2d 478 (Me.Sup.Jud.Ct. 1983), *appeal dismissed* 464 U.S. 923 (1983). [4]

Indeed, as even the dissent in *Rice*, *supra*, notes, unlike liquor transactions (which are regulated consistent with existing laws relating thereto, *see* 25 C.F.R. § 140.18), gambling and drug sales are prohibited at licensed Indian

---

[4] While the dismissal of an appeal for want of a substantial federal question suggests concurrence with the judgment of the lower court, but not necessarily its reasoning, *Mandel v. Bradley*, 432 U.S. 173, 176 (1977), it is still a ruling on the merits. *Hicks v. Miranda*, 422 U.S. 332, 345 (1975).

trader premises. *See Rice*, *supra*, 463 U.S. at 736 (Blackmun, J., dissenting). [5]

Accordingly, in an area as controversial as Indian country gambling, it is the view of the Amici Curiae States that the reasoning and rationale of *Rice*, *supra*, presents the only logical analysis possible. Any other course of action at this point in time can only be viewed as an invitation to further conflict.

II

Notions of Tribal Self-Government Are Not Dispositive of the Gambling Issues Herein

The doctrine which is perhaps most frequently invoked in support of Indian country gambling activities is that of the tribal sovereign right of "self-government." Its most succinct definition is probably found in *Williams v. Lee*, *supra*, where this Court held that, in examining the nature of the jurisdictional relationship between the States and the Indian tribes, the essential inquiry, absent governing federal laws, was whether the state action infringed on the right of reservation Indians "to make their own laws and be ruled by them." *Williams*, *supra*, 358 U.S. at 220.

Under this principle, Indian tribal governments possess the power to enact measures to govern their members with regard to purely internal tribal matters. *See, e.g., Fisher v. District County Court*, 424 U.S. 382, 386 (1976). Furthermore, this Court has recently affirmed the power of Indian tribal governments to impose taxes upon non-Indian,

---

[5] It is also noteworthy that the dissent in *Rice*, *supra*, cites and relies upon *Bryan*, *supra*, for its conclusion that California's jurisdiction over Indian country under Pub.L. 280 does not include general civil regulatory authority. This hypothesis misses the point: even under the "civil/regulatory - criminal/prohibitory" dichotomy, discussed in Argument III, *infra*, the distinct penal sanctions of state laws in a general scheme otherwise characterized as "civil/regulatory" are not properly labeled exclusively "civil", but must be viewed as also being partially "prohibitory" in nature.

non-tribal member business operations within their boundaries. *Kerr McGee Corp. v. Navajo Tribe of Indians*, _____ U.S. _____, 105 S.Ct. 1900 (1985).

On the other hand, similar arguments based upon the purported controlling force of notions of self-government have been rejected or severely restricted by this Court when external tribal relationships are involved. For example, this Court has recently held that, where significant off-reservation effects of on-reservation activities involving non-Indians occur or may be anticipated to occur, and absent federal preemption, it is appropriate to employ a "balancing test" to measure whether the state action involved constitutes an infringement upon tribal self-government. *Rice*, *supra*, 463 U.S. at 720-725. Moreover, in situations where tribal governments have relied upon the principle of self-government to, in effect, "market an exemption" from otherwise applicable state laws which would clearly and properly bind the State's non-Indian populations, this Court has rejected such tribal efforts, even if to do so results in substantial economic hardship to the tribes. *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134 (1980) [6]

The point of the foregoing, however, is that if tribal "self-government" is synonymous with the right to "make their *own* laws and *be* ruled by them," (emphasis added) as enunciated in *Williams v. Lee*, *supra*, then this Court's use of the subjunctive mood (*i.e.*, "*be* ruled") cannot properly be

---

[6] The Ninth Circuit decision herein rejected the reasoning of *Colville*, *supra*, upon the grounds, *inter alia*, that the Indians' interest in generating tribal revenues outweighed California's interest in "protecting against the *potential* for intrusion of organized crime." (emphasis in original). *Cabazon*, *supra*, 783 F.2d at 905. Under such a rationale, unfortunately, the States are presumably not only powerless to act to protect their citizens from such intrusions *before* they occur, they are required to wait until the "potential" evolves into reality and then, belatedly, attempt to remedy that which they had previously been forbidden to prevent. Surely this cannot be viewed as a rational federal policy toward *any* of the States, much less a Pub.L. 280 State such as California.

metamorphasized into an authorization for tribal governments to dictate to the States that non-Indian and non-tribal member residents of such States may, with impunity, venture onto reservations as transitory visitors to engage in activities *within* Indian country which are prohibited to *all* residents — tribal member and non-tribal member alike — within the State *beyond* Indian country. [7]

Stated otherwise, the right of Indian tribal governments to make their own laws and be ruled by them should neither be transformed nor allowed by this Court to be transformed into a mechanism by which the very acts declared by the States through their freely-elected representatives to be against their public policies — and punishable as such — may be wholly disregarded by non-Indian, non-tribal member residents of the States who merely visit the reservations to gamble. While the power of Indian tribal self-government may be a legitimate force in effectuating the goals and objectives of Indians in their reservation internal affairs, it cannot properly be wielded in a fashion which not only disregards but also directly contravenes the laws and public policies of the surrounding States.

III

The "Civil/Regulatory - Criminal/Prohibitory" Dichotomy Must Yield To The Legislative History of the Assimilative Crimes Act and Pub.L. 83-280

As previously noted, the Amici Curiae States consist of jurisdictions where, in general, Pub.L. 280 is not in effect. Nonetheless, the sweep and impact of the lower court ruling herein raises questions which, in the absence of a reversal by this Court, will continue to frustrate and complicate the law enforcement concerns of all States in the Union having

---

[7] Indian country, of course, remains a part of the States within which it exists, save only that in non-Pub.L. 280 States, State laws may have little or no application to *Indians* residing within such areas. *Surplus Trading Co. v. Cook*, 281 U.S. 647, 651 (1930). Certainly no less extensive jurisdiction should be found in Pub.L. 280 States such as California.

Indian country within their borders. Thus, the Amici Curiae States' position is that an examination of Pub.L. 280, as it relates to Indian country gambling from the perspective of non-Pub.L. 280 States, may be of assistance in the resolution of the issues.

Turning to the central issue, lodged firmly at the heart of the Ninth Circuit opinion herein is the proposition that, in a Pub.L. 280 State, if a law exists which may be characterized as "civil/regulatory" in its general nature, as opposed to "criminal/prohibitory," then it cannot be applied within Indian country in such State insofar as Indians and tribal gambling activities are concerned. It is the position of the Amici Curiae States that the Ninth Circuit decision herein should be held invalid as to Pub.L. 280 States as well as invalid and, even if not invalid as to such States, inapplicable in non-Pub.L. 280 States.

To begin with, the Ninth Circuit opinion herein argues that tribal rights of "self-government" regarding gambling override competing or inconsistent State interests because, in States such as California, only "criminal/prohibitory" State laws, rather than "civil/regulatory" State laws, were made applicable by Pub.L. 280. [8] At this juncture, therefore, a brief examination of the logic as well as the conceptual foundations of the dichotomy may be helpful.

As a preliminary matter, and from a purely logical and intellectual standpoint, the "civil/regulatory - criminal/prohibitory" dichotomy as applied to Indian country gambling activities offers too simplistic and mechanical a

---

[8] Other decisions adopting the "civil/regulatory - criminal/prohibitory" dichotomy include, *e.g.*, *Barona Group of the Capitan Grande Band of Mission Indians v. Duffy*, 694 F.2d 1185 (9th Cir. 1982), *cert. denied* 461 U.S. 929 (1983) and *Seminole Tribe of Florida v. Butterworth*, 658 F.2d 310 (5th Cir. 1981), *cert. denied* 455 U.S. 1020 (1982). Decisions rejecting the distinction include, *e.g.*, *United States v. Dakota*, _____ F.2d _____ (No. 85-1568, 6th Cir. July 18, 1986) and *Penobscot Nation v. Stilphen*, 461 A.2d 478 (Me.Sup.Jud.Ct. 1983), *appeal dismissed* (for want of a substantial federal question), 464 U.S. 323 (1983).

solution to the problem. While it may be true that the general activity is regulated by the State primarily as a civil matter, it is a plain non sequitur to conclude that specific state laws intended to regulate the civil general activity with penal enforcement sanctions are also strictly "civil" in nature.

To do so, in effect, is to engage in semantic gymnastics, since by its intrinsic nature the essence of a "regulatory" measure includes not only authorizations of but also limitations upon activities and human behavior, with enforcement accomplished by prohibitions upon activities or behavior which either exceed or circumvent those authorizations and limitations. Thus, *any* regulatory measure must be viewed as an aggregation of authorizations, limitations, prohibitions and penal sanctions. This principle is ignored by the *Cabazon*, *Barona* and *Butterworth* decisions, *supra*.

Furthermore, under the *Cabazon*, *Barona* and *Butterworth* decisions, *supra*, even indisputably appropriate State penal laws could be characterized as "civil/regulatory" and thus purportedly unenforceable against Indians within Indian country. For example, although the licensing and regulation of drivers and the operation of motor vehicles is essentially "civil/regulatory" in nature, the rationale of the *Cabazon*, *Barona* and *Butterworth* decisions, *supra*, would arguably render enforcement of state speed limit laws or drunk driving laws by State officers (in Pub.L. 280 States via 18 U.S.C. § 1162) or Federal authorities (in non-Pub.L.280 States via 18 U.S.C. § 13) impossible within Indian country vis-a-vis Indians. This makes no sense in the area of traffic law enforcement and it makes even less sense when superimposed over the area of Indian country gambling, which, after all, is specifically intended to cater to a non-Indian gambling clientele.

The fundamental infirmity which burdens the "civil/regulatory - criminal/prohibitory" dichotomy insofar as Indian country gambling activities is concerned lies in its

refusal to recognize that *any* collection of State laws which, in the aggregate, forms a regulatory scheme which is civil in its general nature must by definition also include penal or prohibitory enforcement components. Otherwise, the State's regulatory objectives and policies will be rendered completely illusory and unattainable.

Thus, even assuming the propriety of the questionable hypothesis that, under Pub.L. 280 and related similar laws (*e.g.*, 18 U.S.C. § 13, the "Assimilative Crimes Act", applicable in non-Pub.L. 280 States) Congress intended to include only a State's exclusively "criminal/prohibitory" laws, the inclusion of the penal or prohibitory enforcement components of systems otherwise characterized as "civil/regulatory" seems clearly to be intended. Without exception, each of the *Cabazon*, *Barona* and *Butterworth* decisions, *supra*, reached their contrary conclusions based either upon dictum in this Court's opinions or upon demonstrably incorrect and incomplete analysis.

Whether they be Pub.L. 280 or non-Pub.L. 280 jurisdictions, it makes no sense to dictate to the States that under the rubric of the dichotomy they must choose either between permitting limited, regulated gaming activities in the State or repealing all such State laws and prohibiting all such gaming as the only effective means of preventing the abusive practices which have characterized various Indian country gaming operations. In this regard, the "balancing of interests" test adopted by this Court in *Rice*, *supra*, teaches that a proper accommodation of the objectives and concerns of the Indian tribes and the States may be realized through the sanctioning of Indian country gaming operations, but only pursuant to the provisions of otherwise applicable State and Federal laws. [9]

---

[9] Other federal provisions bearing upon these issues include, *e.g.*, 15 U.S.C. § 1175 (gambling devices, as defined in 15 U.S.C. § 1171, prohibited in Indian country), and 25 C.F.R. § 140.21 (gambling, by dice, cards, "*or in any way whatever*," (emphasis added) is strictly prohibited in any licensed trader's store or on the premises).

Turning to the origins of the dichotomy insofar as Indian country gambling activities are concerned, the catchphrase "civil/regulatory - criminal/prohibitory" seems to have originated in the District Court decision in *Seminole Tribe of Florida v. Butterworth*, 491 F.Supp. 1015 (S.D.Fla. 1980), *affirmed* 658 F.2d 310 (5th Cir. 1981), *cert. denied* 455 U.S. 1020 (1982). There, in upholding tribal bingo operations, the District Court turned to an analysis of Pub.L. 280, stating that "[a]s a preliminary matter, however, the court will have to determine if Florida's statute [*i.e.*, Fla. Stat. § 849.093 governing bingo games] can be classified as criminal/prohibitory or civil/regulatory." *Butterworth*, *supra*, 491 F.Supp. at 1018.

The District Court then turned to the decision in *United States v. Marcyes*, 557 F.2d 1361 (9th Cir. 1977), which it characterized as being "particularly helpful in this determination." *Butterworth*, *supra*, 491 F.Supp. at 1019. Although the Assimilative Crimes Act does not directly apply in Indian country within Pub.L. 280 States, it continues to apply in non-Pub.L. 280 States such as the Amici Curiae States. Moreover, as will be discussed in greater detail, *infra*, many conceptual parallels exist between

Pub.L. 280 and the Assimilative Crimes Act, making an examination of both prudent. [10]

In *Marcyes*, *supra*, it was held that the federal Assimilative Crimes Act, 18 U.S.C. § 13, applied to prohibit the sale of fireworks by Indians to the general public, including non-Indians, on the Puyallup Indian Reservation located in East Tacoma, Washington. While the court rejected the Indians' argument that 18 U.S.C. § 13 was inapplicable to their activities, in so ruling it also suggested

---

[10] Certain legal commentators have suggested that despite this Court's decision in *Williams v. United States*, 327 U.S. 711 (1946), it is doubtful that Congress intended that the Assimilative Crimes Act, 18 U.S.C. § 13, be applied to Indian country at all. *See, e.g.*, F.Cohen, *Handbook of Federal Indian Law* (1982 ed.) at 293 n. 95. However, the legislative history reveals that Congress was well-aware of and intended to perpetuate the *continued* applicability of the Assimilative Crimes Act to all Indian country in non-Pub.L. 280 States. *See* 86 Cong.Rec. H1626 (daily ed. Feb. 19, 1940) and House Report 1584, 76th Cong., 3d Sess. accompanying H.R. 7018, which amended 18 U.S.C. § 468, the Assimilative Crimes Act. The following colloquy occurred at that time between Congressmen Celler, Case and McLaughlin:

"Mr. Case of South Dakota. 'Will the gentleman state what part of the Federal law this applies to? Is this the section that adopts the State codes with regard to penalties for various crimes on federal reservations, *including Indian reservations*?'

"Mr. McLaughlin. 'The gentleman is correct.'

"Mr. Case of South Dakota. 'This merely brings this up to date, accepting the State codes?'

"Mr. McLaughlin. 'It simply brings the present law up to date; that is correct. It extends the time for the application of the law.'

"Mr. Celler. 'We have passed these bills almost every session.' " (emphasis added).

Congressman Celler, who sponsored H.R. 7018, noted in his report (*i.e.*, H.R.Rep.No. 1584, *supra*, at 1-2) that the purpose of the law was to update federal law to bring it current with the laws in effect in the States where the reservations were located and would "make no other change *in existing law*." (emphasis added). As the bill's sponsor, Congressman Celler's comments constitute an "authoritative guide to the statute's construction." *Rice*, *supra*, 463 U.S. at 728.

that, for Assimilative Crimes Act purposes, certain dictum in this Court's opinion in *Johnson v. Yellow Cab Transit Co.*, 321 U.S. 383, 389 n. 8 (1944) arguably supported the contention that Congress had not intended to include the penal provisions of a state regulatory system within the ambit of the Act. *Marcyes, supra*, 557 F.2d at 1364.

In *Johnson, supra*, this Court was collaterally presented with the issue of whether 18 U.S.C. § 468 (the federal assimilative crimes statute in existence in 1943) assimilated Oklahoma liquor laws vis-a-vis the federal military reservation at Fort Sill, Oklahoma. A close reading of the case, however, reveals that this Court declined to rule on the question. *Johnson, supra*, 321 U.S. at 390-391.

Footnote 8 of the opinion (*see Johnson, supra*, 321 U.S. at 389 n. 8) offers that had it been the intent of Congress to assimilate the penal provisions of a State "civil/regulatory" system, it would have considered the problem and used more express language. In a well-reasoned dissent, Mr. Justice Frankfurter, joined by Mr. Justice Roberts, expressed the view that the Assimilative Crimes Act statute, 18 U.S.C. § 468, clearly applied. *See Johnson, supra*, 321 U.S. at 398-403 (Frankfurter, J. dissenting).

Moreover, that this Court's observations in footnote 8 in *Johnson, supra*, were dictum is clear: this Court specifically declined to rule on the point, declaring it to be "collateral to the principal issue of the legality of the seizure of the liquor." *Johnson, supra*, 321 U.S. at 391. However, the court in *Marcyes, supra*, avoided direct reliance upon the dictum by finding that the Washington fireworks law was "a prohibitory rather than a regulatory law." *Marcyes, supra*, 557 F.2d at 1364.

Thus, wholly apart from the nature of the said footnote as dictum, the court in *Marcyes, supra*, similarly avoided deciding the issue, thereby generating its own dictum and calling into question the logic of reliance upon the decision for the proposition that, insofar as the Assimilative Crimes Act is concerned, only a State's exclusively "criminal/

prohibitory" laws, and not its "civil/regulatory" laws, even if coupled with penal sanctions for violations, were intended by Congress to be subject to assimilation under 18 U.S.C. § 13.

Furthermore, as to the hypothesis of footnote 8 in *Johnson*, *supra*, that, had Congress intended to subject to assimilation both purely criminal state laws as well as regulatory laws (with penal sanctions), it would have more clearly articulated its intent, a close examination of the legislative history reveals that such is precisely what Congress did.

To begin with, and as acknowledged in *Marcyes*, *supra*, 557 F.2d at 1364, Congress sought to draw within the reach of 18 U.S.C. § 13 "*any* act or omission" (emphasis added) which, although not made punishable by any enactment of Congress would be punishable if committed or omitted within the jurisdiction of the State in which the federal area was located. The use of the terms "any act or omission" seems to encompass far more than just State prohibited criminal acts. Had Congress intended that only State "criminal/prohibitory" laws which were wholly unrelated to "civil/regulatory" systems were to be subject to assimilation, it would have so stated.

However, instead of providing that assimilation would occur only if a person were "guilty of a *crime* which, although not made punishable by any enactment of Congress," the broader phraseology "any act or omission" was selected. This fact alone demonstrates that Congress appeared to have specifically intended this broader reach of the Assimilative Crimes Act. Indeed, there appears to be nothing in the legislative history of the law to support the conclusion that Congress intended to differentiate or exclude from the scope of the law State statutes which serve as

enforcement mechanisms in systems which might otherwise be viewed as civil/regulatory in nature. [11]

For example, in both 1932 and 1933, Congress had before it bills proposing amendments to Sec. 289 of the Federal Criminal Code (*i.e.*, 18 U.S.C. § 468), the then-existing assimilative crimes statute. [12] On March 31, 1932, and in support of H.R. 10589, Congressman Sumners, on behalf of the House Committee on the Judiciary, submitted House Report 959 to the full House. [13] Appended to and incorporated as a part of the Judiciary Committee's report was a December 9, 1931 letter from United States Attorney General William D. Mitchell to the then-serving Chairman of the Committee, Congressman George W. Norris, supporting the amendment.

In describing the reach and operation of the assimilative crimes statute, the Attorney General explained that under the statute, the commission "of *any* act, not made penal by any law of Congress . . . may be punished under *any* State law making such act penal." (emphasis added). [14]

The Attorney General then observed:

---

[11] *See, e.g.*, Note, THE FEDERAL ASSIMILATIVE CRIMES ACT, 70 Harv.L.Rev. 685, 696 (1957):

"*[The Assimilative Crimes Act] offers no support for the exclusion of state regulatory statutes*, since it specifically provides for the punishment of 'any act or omission . . . punishable . . . within the jurisdiction of the State. . . .' (Emphasis added.) *Congress has nowhere indicated that it differentiates between regulatory and other laws and there would seem to be little reason to exclude state laws which would be of use in regulating conduct within the enclaves, despite the fact that the lack of appropriate federal administrative facilities may make comprehensive enforcement impossible.* Because any prosecutions for violation of regulatory laws must be instituted by federal officials, the likelihood of direct interference with federal functions seems slight." (emphasis added).

[12] *See* Act of March 4, 1909, ch. 321, 35 Stat. 1145.

[13] *See* H.R.Rep.No. 959, 72d Cong., 1st Sess.

[14] *Id.* at 1.

> "This is deemed advisable both because there are many Government reservations to which no Federal law is applicable with respect to certain minor offenses (*notably traffic offenses*) - and because, during the 22 years that have elapsed since the passage of the Criminal Code, the pertinent laws of some of the States have been made more stringent, or otherwise amended . . ." (emphasis added). [15]

Although H.R. 10589 passed in the House, it did not receive consideration in the Senate. [16] However, on April 27, 1933, and in support of H.R. 5091 to accomplish the same objectives as H.R. 10589, Congressman Sumners, who had then become Chairman of the House Committee on the Judiciary, presented House Report 56 to the House. [17] Again, Attorney General Mitchell's December 9, 1931 letter was appended to and incorporated into the Committee on the Judiciary report, with H.R. 5091 passing both the House (May 16, 1933) and the Senate (June 10, 1933) and becoming law June 15, 1933. [18]

The significance of these circumstances insofar as the present issues are concerned lies in the apparently plain recognition by both the United States Department of Justice, through Attorney General Mitchell, and the Congress, through H.R.Rep.No. 959, H.R.Rep.No. 56, and H.R. 5091 itself that the assimilative crimes statute was clearly intended by Congress to include within its scope the penal provisions of certain State laws even if those State laws constituted sanctions contained within statutory

---

[15] *Id.* at 2. *See also* 77 Cong.Rec. S5530-S5532 (daily ed. June 10, 1933) (Remarks of Senator Black regarding the purpose and effect of the assimilative crimes statute).

[16] The reason for the failure of H.R. 10589 to pass the Senate in 1932 was due only to congestion in the docket of the Senate Committee on the Judiciary. *See* 77 Cong.Rec. S5530 (daily ed. June 10, 1933) (Remarks of Senator Black.)

[17] *See* H.R.Rep.No. 56, 73d Cong., 1st Sess.

[18] *Id.* at 1-2. *See* Act of June 15, 1933, ch. 85, 48 Stat. 152.

schemes which might otherwise be characterized as "civil" or "regulatory" in their general nature. This is the most logical conclusion to be drawn from Attorney General Mitchell's reference to traffic offenses which might arise within the otherwise civil statutory scheme of licensing and regulating the operation of motor vehicles.

In this regard, it has long been settled that the States may, as a civil or regulatory matter, enact reasonable licensing requirements and regulatory measures governing the operation of motor vehicles on the public highways. *See, e.g., Raymond Motor Transport, Inc., v. Rice*, 434 U.S. 429, 443-444 n. 18 (1978); *Railway Express Agency, Inc. v. New York*, 336 U.S. 106, 111 (1949); *Hendrick v. Maryland*, 235 U.S. 610 (1915). Clearly, this is a valid and appropriate exercise of the States' regulatory jurisdiction. Thus, Attorney General Mitchell's recognition of the need to provide for the incorporation of State traffic offense laws into the Federal Code, as needed, when coupled with the rationale of the cited cases, provides yet additional support for the conclusion that Congress intended to include within the scope of the Assimilative Crimes Act the penal sanctions of otherwise "civil/regulatory" State systems.

Significantly, this is further confirmed through an examination of the colloquy among Senators Black, Herbert and Johnson concerning the 1933 amendments to the assimilative crimes statute. While the amendments had the primary objective of updating the federal law to bring it current with State laws that had changed since its last preceeding amendment, the discussion clearly discloses an acknowledgement that the penal sanction provisions of State laws otherwise viewed as regulatory in their general nature were then — and were to continue to be — assimilated into the federal law. [19]

Although expressing certain concerns over the philosophical wisdom of adopting State laws into the Federal

---

[19] *See* 77 Cong.Rec. S5530-S5532 (daily ed. June 10, 1933).

Code, the discussion plainly reveals a recognition by the legislators, particularly Senator Black of Alabama — who had prepared a report for the Committee on the Judiciary explaining the amendments — that the penal enforcement provisions of otherwise characterized "civil/regulatory" State laws were intended to be assimilated. The gentleman from Alabama was Senator Hugo L. Black, later to become an Associate Justice of the United States Supreme Court. [20]

In addition, although 18 U.S.C. § 13, the Assimilative Crimes Act, does not apply to Indian country within Pub.L.

---

[20] *Id.* at S5530. Senator Black stated:

"Mr. President, I desire to submit a report from the Committee on the Judiciary and ask for the immediate consideration of the bill which I shall explain. I am sure there will be no objection from any Member of the Senate when the situation is understood.

"I report back favorably from the Committee on the Judiciary with an amendment [to] the bill (H.R. 5091) to amend section 289 of the Criminal Code and I ask unanimous consent for its immediate consideration.

. . . .

"I can explain very briefly the purport and intent of the bill. There are certain Government reservations throughout the country. There was enacted in 1909 a law which provided that *all of the laws of the State or district in which a reservation was located should be adopted by the Federal Government as laws governing the acts or things committed or done on those reservations*, but it made the date of those laws as in effect in 1909.

"The result is that today a man may do something on a Government reservation which is not a violation of any State law, which is not a violation of any Federal law, but which would have been a violation of the law of that State in 1909. The man who happens to commit that act on a Government reservation could be punished, although the law of the State had been repealed since 1909. Manifestly, there is no reason for such a law. The total effect and the sole effect of the amendment is to provide a change so that the thing done must be a violation of a law of that State in existence [at the time] of the doing of the act.

"I hope I have made the matter clear to Senators." (emphasis added).

280 States,[21] the legislative history of both Pub.L. 280 and 18 U.S.C. § 13 reveals many close conceptual links between the two laws. Thus, while not directly applicable, the historical chronology of this aspect of Pub.L. 280 may be of assistance in analyzing the issue in non-Pub.L. 280 States such as the Amici Curiae States.

In this regard, prior to 1953, when Pub.L. 280 first became law, most of the federal laws which granted the States jurisdiction over reservation Indians confined themselves to criminal jurisdiction, including the predecessor bills to H.R. 1063, which became Pub.L. 280.[22] Moreover, this circumstance has been interpreted as evincing an intention by Congress to merely effectuate "a switch from the federal government enforcing state criminal law under the Assimilative Crimes Act to the states enforcing their own laws."[23] Thus, the exclusion in 18 U.S.C. § 1162(c) seems clearly to be in recognition of the jurisdiction of Pub.L. 280 States to enforce within Indian country the same types of laws contemplated under 18 U.S.C. § 13, *viz.*, purely prohibitory criminal laws as well as penal sanctions serving as enforcement measures in civil/regulatory schemes.

---

[21] *See* 18 U.S.C. § 1162(c). It must also be noted that, whether in a Pub.L. 280 State or a non-Pub.L. 280 State, offenses committed in Indian country therein by non-Indians either against other non-Indians or non-tribal members, and including "victimless" offenses, remain subject to State laws independently of the provisions of either Pub.L. 280 or 18 U.S.C. § 13. *United States v. Antelope*, 430 U.S. 641, 643 n. 2 (1977); *New York, ex rel. Ray v. Martin*, 326 U.S. 496 (1946). *Cf. State of Arizona v. Herber*, 123 Ariz. 214, 598 P.2d 1033 (App. 1979), wherein the United States Department of Justice filed an amicus curiae brief in support of Arizona's jurisdiction over a non-Indian arrested and prosecuted for possession of marijuana in Indian country.

[22] *See* Goldberg, PUBLIC LAW 280: THE LIMITS OF STATE JURISDICTION OVER RESERVATION INDIANS, 22 U.C.L.A.L.Rev. 535, 544 n. 45 (1975). It should be noted that Professor Goldberg-Ambrose is on the Board of Authors and Editors of the 1982 revised edition of F. Cohen, *Handbook of Federal Indian Law* (1982), a recognized treatise in the area of Indian law; *cf. Bryan, supra*, 426 U.S. at 379, 388 n. 13.

[23] *Id.*

Accordingly, the reliance in the *Cabazon*, *Barona* and *Butterworth* decisions, *supra*, upon the *Marcyes* discussion, in turn, of the dictum in this Court's footnote 8 in *Johnson*, *supra*, further demonstrates the weakness of the "civil/regulatory - criminal/prohibitory" dichotomy. Furthermore, the distinction cannot be legitimized by reliance upon notions of tribal self-government: it must be remembered that the sole raison d'etre for Indian country gambling operations lies in the enticement of a virtually exclusive non-Indian playing clientele to venture onto Indian reservations to participate in acts within Indian country *because* they are prohibited beyond Indian country. This should not be the federal policy toward this topic. [24]

There exists, however, additional evidence that the rationale of the *Cabazon*, *Barona* and *Butterworth* decisions, *supra*, is in error. The basis for that error lies in an examination of this Court's decision in *Bryan*, *supra*. There, this Court held that Pub.L. 280 was not intended by Congress to constitute a grant to the State of Minnesota of civil taxation jurisdiction over tribal member Indians on their reservations. [25]

To begin with, in *Bryan*, *supra*, this Court was faced with the question of whether or not Minnesota's substantive civil tax laws — as opposed to civil procedural laws governing private causes of action in state court — were applicable to a tribal member Indian in Indian country within Minnesota. In rejecting such applicability, this Court turned to the

---

[24] The federal policy toward strong law enforcement by the States and the Federal Government with regard to gambling activities is evident. *See, e.g.*, Report to the President and the Attorney General of the President's Commission on Organized Crime, *The Impact: Organized Crime Today*, Vol.I, pp.11-12; Vol. III, § 3.3.2, pp.28-33 (April, 1986).

[25] A contrary result had been reached by the United States District Court for the District of Nebraska and the United States Court of Appeals for the Eighth Circuit. *See Bryan*, *supra*, 426 U.S. at 378 n. 3; *Omaha Tribe of Indians v. Peters*, 382 F.Supp. 421 (D. Nebr. 1974), *affirmed* 516 F.2d 133 (8th Cir. 1975), *vacated* 427 U.S. 902 (1976)."

legislative history of Pub.L. 280. After acknowledging that the central focus of Pub.L. 280 was concern by Congress for the enforcement of state criminal laws in Indian country, this Court found that the grant of civil jurisdiction to the States was limited to those civil laws relating to private rights and status and the concomitant jurisdiction of the State courts to adjudicate such rights and status when Indians were involved. *Bryan*, *supra*, 426 U.S. at 379-387.

In particular, this conclusion was emphasized by the Court's observation that the "consistent and exclusive . . ." use of terms deemed to establish that Congress had not intended to subject Indians to the direct application of state substantive civil laws rendered Minnesota's attempt to impose its tax laws upon Indians in Indian country ineffectual. *Bryan*, *supra*, 426 U.S. at 385.

In reaching this result, this Court acknowledged, however, that a congressional report, H.R.Rep.No. 848, recognized that the Indians of several States had reached a stage of acculturation and development that made desirable the extension of State civil jurisdiction to the Indian country. [26] However, this Court rejected the effect of that congressional finding upon the grounds that it was an "unelaborated statement . . ." the thrust of which was too difficult to reconcile with the focus of Pub.L. 280. [27]

A closer examination of H.R.Rep.No. 848 (which was in turn incorporated into S.Rep.No. 699 on the same bill, H.R. 1063) discloses that an additional portion of the language of S.Rep.No. 699 being quoted was omitted by ellipsis in the

---

[26] H.R.Rep.No. 848, presented on July 16, 1953, accompanied H.R. 1063, which eventually became Pub.L. 280. A virtually identical Senate report, S.Rep.No. 699, presented on July 29, 1953, adopted and incorporated H.R.Rep.No. 848 in support of H.R. 1063. *See* U.S. Code Cong. & Admin. News 1953, p. 2409.

[27] In support of this finding, this Court cited with apparent approval the discussion of the issue in the Goldberg law review article, *supra*, 22 U.C.L.A.L.Rev. at 543. *See Bryan*, *supra*, 426 U.S. at 388 n. 13.

law review article.[28] The language of H.R.Rep.No. 848 and S.Rep.No. 699 which was omitted from the law review article strongly indicates an elaboration by Congress upon the question of the applicability of substantive State penal enforcement laws in Pub.L. 280 States.[29]

In fairness, however, it must be noted that, in subsequent footnote 188 in the law review article, the "substantive civil laws" language of the foregoing quote is included and discussed in connection with a further examination of the question of whether Pub.L. 280 jurisdiction was intended by Congress to be limited to civil "causes of action." The text of the law review article to which footnote 188 relates concluded that that portion of Sec. 4 of Pub.L. 280, dealing with the grant of civil jurisdiction to the States, appeared to preclude the argument that Pub.L. 280 was merely an authorization for State courts to serve process on tribal member Indians for such causes of action as tort law and contract law as may arise on the reservations, with

---

[28] *See* 22 U.C.L.A.L.Rev. at 543.

[29] *See* S.Rep.No. 699, at 5-6 and H.R.Rep.No. 848, at 6, both reprinted in U.S. Code Cong. & Admin. News 1953, p. 2412. The complete paragraph in question reads as follows:

"Similarly, the Indians of several States have reached a stage of acculturation and development that makes desirable extension of State civil jurisdiction to the Indian country within their borders. Permitting the State courts to adjudicate civil controversies arising on Indian reservations, *and to extend to those reservations the substantive civil laws of the respective States insofar as those laws are of general application to private persons or private property, is deemed desirable.*" (emphasis added).

regulatory and licensing jurisdiction to be confined to the tribes themselves." [30]

These circumstances seem clearly to support the position of the State of California herein. After tracing various of the indicia of congressional intent with regard to the scope of civil jurisdiction under Pub.L. 280, including the remarks of Sen. Sam Ervin regarding the 1968 amendments to the law, [31] Professor Goldberg concluded that "this legislative history fails to define the extent of civil jurisdiction under Pub.L. 280." *See* 22 U.C.L.A.L.Rev. at 577. The author also examines the question of whether civil "public" actions such as the licensing of professionals and regulation of land use, which are "usually backed up by the threat of criminal or civil enforcement" by the States, were intended to be included within the scope of Pub.L. 280. Id. at 578.

In yet another footnote, Professor Goldberg then opines that State regulation of on-reservation activity in Pub.L. 280 States would appear to be appropriate and consistent with

---

[30] 22 U.C.L.A.L.Rev. at 576 n. 188 then concludes:

"The statement in the Senate Report noting that PL-280 permits state courts both 'to adjudicate civil controversies arising on Indian reservations, and to extend to those reservations the substantive civil laws of the respective States' *seems to confirm this assessment of the law*. S.Rep.No. 699, supra note 23, at 5. *The counsel for the B.I.A. at the hearings on PL-280 also supported this interpretation* when he stated that the law

> 'would mark a definite step forward in the inclusion into the general body of the people of the Indians of that particular State with respect to civil and criminal jurisdiction, *so that they will be subject to the same laws and the same rules as the other citizens.*'

Statement of Harry A. Sellery, Jr., Chief Counsel, B.I.A., June 29, 1953, in Hearings Transcript I, supra note 22, at 5. Furthermore, the language of Pub.L. 280 excepting from state jurisdiction the power to encumber trust property or regulate it in a manner inconsistent with federal law would seem unnecessary if regulatory jurisdiction had not been conferred at all. 28 U.S.C. § 1360(b) (1970) (quoted in note 157 supra)." (emphasis added).

[31] *Cf. Bryan, supra*, 426 U.S. at 387.

the intent of Congress where the activity, although generally of a "civil" nature, is subject to criminal sanctions, notwithstanding any conceptual distinction sought to be drawn between sanctions imposed under "regulatory" schemes or under "prohibitory" schemes. [32]

While the foregoing seems plainly adequate to establish that the "civil/regulatory - criminal/prohibitory" dichotomy as fashioned and applied by the lower court herein is lacking in both a firm conceptual or historical basis, one final point of confirmation should be noted regarding the position of the United States Department of Interior on H.R. 1063, which became Pub.L. 280.

As pointed out by the State of California in its opening brief, on June 26, 1953, prior to the presentation of either H.R.Rep.No. 848 or S.Rep.No. 699, Mr. Orme Lewis, Assistant Secretary of the Department of the Interior, transmitted a report to Congressman A.L. Miller outlining certain changes and clarifications regarding H.R. 1063 deemed necessary by the Department of Interior. The report had been requested by Congressman Miller as Chairman of the House Committee on Interior and Insular Affairs, which committee has as one of its major functions the responsibility of overseeing matters involving Indian affairs. The report, in the form of a letter, acknowledged that as to the question of the scope of civil jurisdiction under H.R. 1063, the intent of the law was to bestow jurisdiction upon the States

---

[32] *See* 22 U.C.L.A.L.Rev. at 578 n. 198. The author further notes that the problem is generally avoided in non-Pub.L. 280 States, since State criminal laws may be enforced pursuant to 18 U.S.C. § 13, the Assimilative Crimes Act, and concludes, *inter alia*, that the language in Pub.L. 280 normally seized upon by Indians as demonstrating a congressional intent to limit state jurisdiction to civil causes of action alone was

> "the product of ambiguous drafting, and not of fundamental policy choices. *It is most likely that criminal and civil jurisdiction were designed to be coextensive, and similarly regulatory in nature.*" (emphasis added). 22 U.C.L.A.L.Rev. at 580.

> "not *merely* to permit the State courts to adjudicate civil controversies arising on Indian reservations in California, but *also to extend to those reservations the substantive civil laws of the State insofar as those laws are of general application to private persons or private property.* The revision would also make it clear that Indian tribal customs and ordinances would continue to be applicable to civil transactions among the Indians *insofar as these customs or ordinances are not inconsistent with the applicable State laws.* By so doing the predominance of State authority would be assured, but with a minimum of interference with Indian control of Indian affairs." (Emphasis added.)

The full text of the letter is included in the Joint Appendix herein. Since the document is not generally available, a copy is included in the appendix of the Brief of the Amici Curiae States, *infra*, for the convenience of the Court and counsel.

In view of this report to Chairman Miller from Mr. Lewis, as the then-serving Assistant Secretary of Interior, there would appear to be significant and fundamental inconsistencies between the legislative history of Pub.L. 280 and the conclusions reached by the lower court decision herein regarding the applicability of this Court's decision in *Bryan, supra*, to the issue of Indian country gambling operations. Moreover, even if Mr. Lewis' report were interpreted as not being inconsistent insofar as the taxation issues under consideration in *Bryan, supra*, were concerned, it would still be manifestly illogical and unwarranted to interpret the report as supporting the "civil/regularory - criminal/prohibitory" dichotomy adopted by the lower court herein.

Accordingly, the complicated history of Pub.L. 280 and the Assimilative Crimes Act as summarized herein is intended to demonstrate but one point, *viz.*, that whether viewed from the perspective of a Pub.L. 280 State or from that of a non-Pub.L. 280 State, such as the Amici Curiae States, the decision of the Ninth Circuit Court of Appeals in

the *Cabazon* case, *supra*, can be viewed as accomplishing nothing but a result. The holding is based upon erroneous assumptions, incomplete analyses, and dictum from judicial decisions having little if any relevance to the central issues concerning gambling within Indian country.

For all the foregoing reasons, insofar as the *Cabazon*, *Barona* and *Butterworth* decisions, *supra*, rely upon this Court's decision in *Bryan*, *supra*, the reliance is clearly misplaced. While the rationale of *Bryan*, *supra*, may be applied to questions involving the propriety of Pub.L. 280 States' attempts to subject tribal member Indians to State taxes, the attempt to transpose its "civil/regulatory - criminal/prohibitory" analysis onto questions of Pub.L. 280 jurisdiction over Indian country gambling activities — particularly in light of the legislative history of both Pub.L. 280 and 18 U.S.C. § 13 — seems clearly to be strained and without persuasive logic.

In this regard, the rationale of this Court's ruling in *Rice*, *supra*, delineates the more enlightened and appropriate approach to a solution of the difficult questions presented by Indian country gaming activities.

IV

Any Ruling On The Merits In This Case Should Be Narrowly Drawn

In the event that, notwithstanding the foregoing arguments, this Court ultimately affirms the lower court decision, it is the position of the Amici Curiae States that any opinion issued should be narrowly drawn. This request is made in order to preserve the rights of the Amici Curiae States to enforce their otherwise applicable laws regarding gambling activities in Indian country as to such activities *other* than those directly under consideration in the State of California.

In this regard, certain of the Amici Curiae States, as noted in the Statement of the Interest of the Amici Curiae, *supra*, are presently confronted with actual or proposed Indian country gambling operations involving types and modes of

gaming which are, in the view of the Amici Curiae, prohibited as a matter of both Federal and State law both within and beyond Indian country in the said States. Stated otherwise, the type and/or mode of gambling activity is not "regulated" beyond Indian country at all, but is uniformly prohibited throughout the States.

For example, the Amici Curiae State of Arizona is presently involved in litigation calling into question whether a parimutual jai alai fronton may be built and operated within Indian country just south of the Phoenix metropolitan area. *See Gila River Indian Community v. Corbin*, No. CIV 85-1032 PHX EHC (D.Ariz. filed April 12, 1985); *C.A.H.K., Inc., et al., v. Corbin*, No. CIV 85-1037 PHX EHC (D.Ariz. filed April 15, 1985) (consolidated). It is the position of the Amici Curiae State of Arizona that, regardless of the outcome of the present case, it should have the opportunity to litigate the separate legal questions presented in the foregoing disputes from the perspective of a non-Pub.L. 280 State.

While the Amici Curiae States, representing jurisdictions where Pub.L. 280 is not generally in effect, support the position of the State of California, it remains their position that even if the lower court decision be affirmed, the historical, factual and legal specifics which exist their respective jurisdictions provide various bases upon which the situation in California may be distinguished.

CONCLUSION

This Court has recently confirmed that, foremost among the prerogatives of the sovereignty of the *States* is the "power to *create and enforce* a criminal code." (emphasis added). *Heath v. Alabama*, _____U.S. _____, 106 S.Ct. 433, 440 (1986). In essence this articulates an attribute of *State* self-government which, under the rationale of *Rice, supra*, should be accorded deference and balanced against the competing interests of the Federal and Tribal governments. *See also, Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico*, _____ U.S. _____ (July 1,

1986; 46 CCH S.Ct. Bull.P. B4135). There, this Court opined — in response to the Puerto Rico Legislature's concern that advertising of casino gambling aimed at Puerto Rican citizens posed the threat of, among other evils, the development of corruption and the infiltration of organized crime — that a legislature's "interest in the health, safety, and welfare of its citizens constitutes a 'substantial' governmental interest." *Posadas*, *supra*, 46 CCH S.Ct.Bull. at B4149.

The Amici Curiae States would respectfully submit that the States' legitimate law enforcement concerns vis-a-vis Indian country gambling operations fall clearly within the same rationale acknowledged in *Posadas*, *supra*. Accordingly, and for all of the foregoing reasons, the result must be the reversal of the United States Court of Appeals for the Ninth Circuit decision herein.

ROBERT K. CORBIN
Attorney General of Arizona

ANTHONY B. CHING
Solicitor General
Office of the Arizona
Attorney General

IAN A. MACPHERSON*
Chief Counsel, Tax Division
Office of the Arizona
Attorney General
1275 W. Washington St.
Phoenix, Arizona 85007
(602) 255-1719

*Counsel of Record

(August, 1986)

UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF INDIAN AFFAIRS
Washington 25, D.C.

June 26, 1953

My dear Mr. Miller:

This will refer to your request for a report on H.R. 1063, a bill "To amend title 18, United States Code, entitled 'Crimes and Criminal Procedure', with respect to State jurisdiction over offenses committed by or against Indians in the Indian country, and to confer on the State of California civil jurisdiction over Indians in the State".

I recommend that this bill be enacted if its title and text are amended to conform to the enclosed draft.

The bill would extend the criminal laws of the State of California to all the Indian country within that State. Concurrently, it would withdraw the entire State from the operation of the Federal Indian liquor laws. Finally, it would permit the courts of the State of California to adjudicate civil controversies of any nature affecting Indians within the State, except where trust or restricted property is involved.

Approximately 30,000 Indians live in the State of California. They are divided into many different groups, widely dispersed throughout the State. Their lands include a large number of small rancherias and allotments, which are also widely scattered. The State lacks jurisdiction to prosecute Indians for most offenses committed on Indian reservations or other Indian country as defined in title 18, United States Code, section 1151, except in the case of the Agua Caliente Indian Reservation. State criminal jurisdiction over this one reservation was conferred by the Act of October 5, 1949 (63 Stat. 705.)

The applicability of Federal criminal laws is also limited. The United States district courts have a measure of jurisdiction over offenses committed on Indian reservations or other Indian country by or against In-

dians, but in cases of offenses committed by Indians against Indians that jurisdiction is limited to the so-called ten major crimes listed in section 1153 of title 18, United States Code. As a practical matter, the enforcement of law and order among Indians in the Indian country has been left largely to the Indian groups themselves, and in California they are not adequately organized to perform that function. The Indians of the Hoopa Valley Reservation and the Yuma Reservation have a form of tribal law enforcement, but none of the other reservations in the State has any means of preserving law and order. Consequently, there is a serious hiatus in law enforcement authority that can best be remedied by conferring criminal jurisdiction on the State. The Indians of California have also reached a stage that makes desirable the extension of State civil jurisdiction to the Indian country in that State. This has already been accomplished on the Agua Caliente Indian Reservation by the Act of October 5, 1949 (63 Stat. 705). A likely policy should be applied to the rest of the State. In doing so due regard should be given, of course, to the safeguarding of the rights guaranteed the Indians by Federal treaties, agreements, and statutes.

At the direction of the Commissioner of Indian Affairs, the Area Director of the Bureau of Indian Affairs at Sacramento, California, consulted with the various Indian groups on a legislative proposal similar to H.R. 1063. No opposition to the enactment of the proposed legislation was voiced by any of the Indian groups. The Hoopa Valley Indians, comprising the largest single group within the State, have adopted resolutions favoring the proposal to confer civil and criminal jurisdiction on the State, Representatives of other groups have also indicated their approval.

Proposed legislation similar to H.R. 1063 has been discussed with the Governor of California and he has indicated his approval of the objective of the proposal. The Legislature of California, by Senate Joint Resolution No. 29, has recently memorialized the Congress to enact H.R. 1063.

The revisions incorporated in the enclosed draft would clarify the intent of the civil jurisdiction provisions in several particulars. They would make it clear that the effect of the bill would be, not merely to permit the State courts to adjudicate civil controversies arising on Indian reservations in California, but also to extend to those reservations the substantive civil laws of the State insofar as these laws are of general application to private persons or private property. The revision would also make it clear that Indian tribal customs and ordinances would continue to be applicable to civil transactions among the Indians insofar as these customs or ordinances are not inconsistent with the applicable State laws. By so doing the predominance of State authority would be assured, but with a minimum of interference with Indian control of Indian affairs.

The enclosed draft is designed to perfect H.R. 1063 in a manner consistent with its basic intent. The only major substantive difference is the omission of the provisions that would have excluded the entire State from the Operation of the Federal Indian liquor laws. There is no doubt that the Indians of California are as prepared to be subjected to the other laws of the State. However, general legislation to repeal, in whole or in part, the Indian liquor laws is now before the Congress, and it seems preferable to deal with the subject in that manner rather than in a bill, such as H.R. 1063, having a different primary objective.

In large measure the criminal jurisdiction provisions of the enclosed draft are identical with those of H.R. 1063. The subsection that would have reserved to the Federal courts concurrent jurisdiction over offenses by or against Indians has been omitted as its effect would be to make persons in the Indian country subject to two different, and possibly conflicting, systems of law. For like reasons, a subsection has been added that would render inapplicable in California the Federal criminal laws which apply to offenses committed by or against Indians within the Indian country. Finally, the subsection relating to the protection of trust or restricted Indian property and of Indian fishing and hunting rights

has been revised in an effort to make its provisions as precise and certain as possible.

The provisions of the enclosed draft relating to civil jurisdiction are based on those of H.R. 1063, but have been recast in a form that would permit them to be incorporated in the general body of the judicial laws as now codified in title 28 of the United States Code. These provisions are designed to give the State of California jurisdiction over civil controversies and transactions involving Indians to the fullest extent consistent with the discharge of Federal responsibility for the protection of trust or restricted property. The State and its courts could not take any action that would affect the status of this property in any way or that would improperly deprive the Indians of any of the benefits therefrom. However, once the trust or restriction was terminated by the United States, the jurisdiction of the State and its courts would automatically attach.

Both H.R. 1063 and the enclosed draft would repeal section 1 of the Act of October 5, 1949 (63 Stat. 705), which conferred on the State of California civil and criminal jurisdiction over the land and residents of the Aqua Caliente Indian Reservation. The enactment of H.R. 1063, applicable to the entire State, should be accompanied by the repeal of section 1 of this Act in order to make the same civil and criminal jurisdictional statute applicable to all Indian country within the State.

Since I am informed that there is a particularly urgency for the submission of the views of the Department, this report has not been cleared through the Bureau of the Budget and, therefore, no commitment can be made

concerning the relationship of the views expressed herein to the program of the President.

Sincerely yours,

Orme Lewis
Assistant Secretary of the
Interior

Hon. A. L. Miller, Chairman
Committee on Interior and Insular Affairs
House of Representatives
Washington 25, D. C.
Enclosure